

**\*E-FILED 11/17/05\***

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

REESE M. JONES,

Plaintiff,

v.

DEUTSCHE BANK AG, et al.,

Defendants.

NO. 5:04-cv-5357 JW (RS)

**ORDER DENYING  
DEFENDANTS' MOTION TO  
BIFURCATE DISCOVERY AND  
GRANTING PLAINTIFF'S  
MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS**

I. INTRODUCTION

Plaintiff Reese Jones ("Jones") moves to compel the further production of documents from defendants Deutsche Bank AG and Deutsche Bank Securities, Inc. (collectively, "Deutsche") in response to his first request for production of documents. At issue is Request No. 4, seeking all documents that refer or relate to the CARDS facility that Deutsche produced to any government agency. Deutsche objects to the production of these documents, arguing that they are protected from disclosure under various privileges and that, even assuming such privileges are inapplicable, they are irrelevant to the claims presented in the case.

In a separate motion, Deutsche moves to bifurcate and limit discovery to the issue of whether or not the CARDS investment strategy involves the purchase or sale of securities: a question, according to Deutsche, if answered in its favor, carries the potential of bringing this litigation to a close. The motions were fully briefed and heard by the Court on November 16, 2005. Based on all papers filed to date, as well as on the oral argument of counsel, (1) the motion to bifurcate is denied as Deutsche has failed to

1 demonstrate how that procedure would promote the efficient, economical, and fair management of this  
2 action, and (2) plaintiff's motion to compel is granted as the requested documents are not privileged and  
3 may contain relevant information or lead to the discovery of admissible evidence.

## 4 II. BACKGROUND

5 The Custom Adjustable Rate Debt ("CARDS") Facility was a tax driven investment device  
6 marketed by Deutsche to Jones. In March 2002, the Internal Revenue Service ("IRS") listed CARDS as  
7 an abusive tax shelter. IRS Notice 2002-21. The United States Senate investigated the role of Deutsche,  
8 as well as others, in promoting and developing CARDS and other tax driven investments. As a result of the  
9 actions taken by Deutsche, Jones contends that he has been audited by the IRS and owes millions of  
10 dollars in back taxes and interest. He sued Deutsche and additional entities for violations of the Racketeer  
11 Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, and securities fraud.

12 Pursuant to the discovery provisions contained in the Private Securities Litigation Reform Act  
13 ("PSLRA"), discovery was stayed pending the determination of a motion to dismiss filed by Deutsche. On  
14 July 19, 2005, the presiding judge granted in part the motion to dismiss and dismissed the securities claim  
15 filed by Jones with leave to amend. Jones declined to amend, however, therefore the action is proceeding  
16 solely on the RICO claim for relief and discovery is no longer stayed. Although the parties have exchanged  
17 limited discovery, Deutsche refuses to produce the documents provided to governmental agencies regarding  
18 the CARDS facility based on various objections as well as on its related motion to limit discovery at this  
19 juncture to the issue of the presence or absence of "securities" as part of the CARDS program.

## 20 III. STANDARDS

### 21 A. Motion to Bifurcate Discovery

22 Under Fed. R. Civ. P. 16(a)(1)-(5), the Court has discretion over case management and may take  
23 appropriate action with respect to an order for a separate trial pursuant to Fed. R. Civ. P. 42(b) pertaining  
24 to a particular issue in the case. Fed. R. Civ. P. 42(b) states,

25 The court, in furtherance of convenience or to avoid prejudice, or when separate  
26 trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-  
27 claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims,  
cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of  
trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of

1 the United States.

2 Fed. R. Civ. P. 42(b) permits deferral of costly and possibly unnecessary discovery proceedings pending  
3 resolution of potentially dispositive preliminary issues. Ellingson Timber Co. v. Great Northern Ry. Co.,  
4 424 F.2d 497, 499 (9th Cir. 1970).

5 B. Motion to Compel Discovery

6 Under the Federal Rules of Civil Procedure, Rule 26(b)(1),

7 [p]arties may obtain discovery regarding any matter, not privileged, that is  
8 relevant to the claim or defense of any party...For good cause, the court may  
9 order discovery of any matter relevant to the subject matter involved in the  
action. Relevant information need not be admissible at the trial if the discovery  
appears reasonably calculated to lead to the discovery of admissible evidence.

10 Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the  
11 determination of the action more probable or less probable than it would be without the evidence." Federal  
12 Rules of Evidence, Rule 401. Discovery may be limited by the court for good cause shown, "to protect a  
13 party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ.  
14 P. 26(c).

15 Motions to compel are authorized by Rule 37 of the Federal Rules of Civil Procedure:

16 [If] a party fails to answer an interrogatory submitted under Rule 33, or if a party,  
17 in response to a request for inspection submitted under Rule 34, fails to respond  
18 that inspection will be permitted as requested or fails to permit inspection as  
19 requested, the discovering party may move for an order compelling an answer, or  
a designation, or an order compelling inspection in accordance with the request.  
The motion must include a certification that the movant has in good faith  
conferred or attempted to confer with the person or party failing to make the  
discovery in an effort to secure the information or material without court action.

20 Fed. R. Civ. P. 37(a)(2)(B).

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23 IV. DISCUSSION

24 A. Motion to Bifurcate Discovery

25 Deutsche requests that the Court limit the first phase of discovery to matters relating to whether or  
26 not the CARDS investment strategy involved the purchase or sale of securities, arguing that bifurcation  
27 would avoid unnecessary and costly discovery proceedings and promote judicial economy since the issue is

1 dispositive of the remaining RICO claim.<sup>1</sup> Jones responds that discovery should not be bifurcated because  
2 it would result in prejudice to him by causing further delay, preventing him from taking discovery necessary  
3 to prepare his own motion for summary judgment, and hindering his ability to obtain complete depositions  
4 from witnesses while their memories are fresh. Jones notes, therefore, that Deutsche has not met its burden  
5 of proving that bifurcation is justified or nonprejudicial.<sup>2</sup> Moreover, Jones contends that there is no real  
6 prospect that Deutsche will prevail on the argument that a "purchase or sale of securities" is involved.

7 Deutsche simply has not demonstrated how further delay of full discovery in the form of its  
8 bifurcation request is warranted. Even assuming the potential dispositive nature of the "securities" issue, that  
9 prospect is not enough to warrant a delay of general discovery in a case which has already had an extended  
10 discovery stand-down by virtue of motion practice under the PSLRA. Deutsche similarly fails to identify  
11 clearly or to quantify in any way the hardship that would result if discovery bifurcation is denied. The  
12 overall nature of the CARDS Facility overlaying the "securities" question would seem to implicate other,  
13 overlapping discovery issues, and therefore bifurcation would not seem to promote judicial economy or  
14 efficiency. Moreover, Jones has established that he may be prejudiced if discovery is bifurcated, as it  
15 would cause further delay and prevent him from taking the discovery necessary for the efficient  
16 development of his case.

17 Bifurcation is not justified in all cases in which one issue may be dispositive. Rather, full and  
18 complete discovery may encourage more thorough preparation by the parties and opportunity for resolution  
19 of the entire action. Deutsche's motion, therefore, is denied.

20 B. Motion to Compel Production of Documents

21 The fourth request for production of documents propounded by Jones to Deutsche seeks  
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23 <sup>1</sup>The PSLRA amended the RICO statute to provide that no person may rely upon conduct that would have been  
24 actionable as fraud in the purchase or sale of securities to establish a violation of 18 U.S.C. § 1962, unless there has been a  
prior criminal conviction for that conduct.

25 <sup>2</sup> Jones further argues that the issue of whether the CARDS facility involved the purchase or sale of securities is  
26 not dispositive of the matter because Jones may consolidate the state and federal court actions with the instant one, and  
27 Jones could amend the complaint to plead securities fraud. However, since neither of those events have actually occurred,  
the Court declines to speculate on such developments for purposes of this decision.

1 documents which refer or relate to the CARDS Facility previously produced by Deutsche to any  
2 government agency, including the IRS, the Department of Justice, the Department of Treasury, the SEC,  
3 the United States Senate, the Federal Trade Commission, the FBI, any state tax agency, or any state  
4 attorney general.<sup>3</sup> Deutsche objected to the request on the grounds that "it purports to require disclosure of  
5 communications that would be prohibited or arguably prohibited by law." See Exh. B to Jonak  
6 Declaration. Deutsche raised additional objections, including relevancy and burden, and did not provide  
7 any responsive documents to Jones.

8 1. Government Thought Processes

9 With respect to their objection that the request calls for the disclosure of documents which are  
10 "arguably prohibited by law," Deutsche first contends that Jones improperly seeks to discover "the thought  
11 processes of various government agencies that have investigated certain alleged tax shelters." See  
12 Opposition Brief, Document 151, at p. 11. A plain reading of the request shows, however, that it does not  
13 seek the mental impressions of anyone, including those formed by any government agencies, nor is it  
14 directed to any tax shelters other than the relevant CARDS Facility. Moreover, even assuming the request  
15 somehow sought to explore the mental impressions formed by government agencies, Deutsche has failed to  
16 establish its standing to raise such objections on behalf of the government. Although Deutsche argues that  
17 the materials it produced to various government agencies are not relevant to the present case since those  
18 investigations did not focus solely on the CARDS facility, the compilation of materials related to the  
19 CARDS investigation presumptively will yield relevant information, even if the fact of what the government  
20 sought to review is not relevant in and of itself.

21 2. Confidential Information

22 Deutsche next asserts that the request seeks confidential materials, such as those provided to grand  
23 juries and the IRS, which are protected from disclosure by various statutes and caselaw. See e.g., Fed. R.  
24 Crim. Pro. 6(e); In re John Doe Grand Jury Proceedings, 537 F. Supp. 1038 (D. R. I. 1982) (litigant may  
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26 <sup>3</sup> As noted at oral argument, no substantive objections were raised to the first three discovery requests propounded  
27 by Jones beyond Deutsche's bifurcation request. In light of the denial of that motion, Deutsche presumably will produce  
28 documents responsive to those requests in the ordinary course.

1 not seek documents directly from a grand jury due to secrecy provisions set forth in Fed. R. Crim. Pro.  
2 6(e)). The Ninth Circuit, however, has held that business records submitted to a grand jury are not "matters  
3 occurring before a grand jury" and are not, therefore, protected from subsequent disclosure under Rule 6(e)  
4 where the records were independently generated and are sought for a legitimate purpose. United States v.  
5 Dynavac, Inc., 6 F.3d 1407, 1412-13 (9th Cir. 1993) (affirming district court's denial of motion to quash  
6 subpoena of business records previously supplied to grand jury by defendant). Moreover, Deutsche cites  
7 to no rule, case, or statute precluding it from producing records previously produced to agencies such as  
8 the IRS or the Senate. In fact, Deutsche has been ordered to produce such records by at least one other  
9 court. See e.g., Seippel v. Deutsche Bank, et al., 2005 WL 388561, \*1 (S.D.N.Y. 2005) (court ordered  
10 discovery to proceed as to documents which had been produced to the government).

11 Further, as noted above, Deutsche lacks standing to raise confidentiality concerns which may  
12 rightfully be raised by other entities, such as the grand jury. In sum, the requested documents are not  
13 protected by any confidentiality restrictions Deutsche is in a position to invoke.

### 14 3. Financial Privacy Act

15 Deutsche also argues that it must comply with the Financial Privacy Act ("FPA"), 12 U.S.C. §§  
16 3402, 3403(a) and (b), 3411, before it can release financial records concerning its customers. The FPA,  
17 however, provides for special procedures only when disclosing financial information to government  
18 agencies; it has no application to litigation between private individuals and Deutsche Bank. Id.  
19 Nonetheless, Deutsche contends that the Act is implicated in this situation since discovery has been  
20 consolidated with another action, Douglas v. United States, C-03-4518 JW, involving government agencies  
21 which may, therefore, lead to the production of financial records, at least indirectly, to the government. The  
22 prospect that documents produced by Deutsche in this action between private litigants may indirectly lead  
23 to the disclosure of materials to the government in an action consolidated here for only limited discovery  
24 purposes is not enough to trigger FPA obstacles to disclosure. Should the prospect of disclosure to the  
25 government of materials produced pursuant to these requests become a reality, the parties are free to  
26 address that issue as needed. Moreover, to provide further protection against the dissemination of such  
27 information, plaintiff's counsel will not disclose such materials to the government without further court order.



1 Dated: 11/17/05

/s/ Richard Seeborg  
RICHARD SEEBORG  
United States Magistrate Judge

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**THIS IS TO CERTIFY THAT NOTICE OF THIS ORDER HAS BEEN DELIVERED TO:**

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**Dated: 11/17/05**

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**By: /s/ BAK**